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No. 00-747

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IN THE

Supreme Court of the United States

IBRAHIM ALSAEED,

Petitioner,

v.

MICHELLE THORPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the First District of Texas correctly applied the procedural laws of the State of Texas as they relate to the burden of proof in a summary judgment proceeding, when the Petitioner claims to have exercised his right to petition under the First Amendment.

Michelle Thorpe respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Ibrahim Alsaeed. Because this is not an appeal of a final judgment of the highest court of Texas, this Court does not have jurisdiction to hear this case. Further, this is an appeal of Texas procedural law as applied to a Texas Summary Judgment Proceeding; therefore, no federal question is presented.

COUNTERSTATEMENT OF THE CASE

Respondent objects to Petitioner's Statement of the Case in that Petitioner attempts to argue his case instead of presenting a concise statement of the case setting out the facts material to consideration of the question presented. Pet. at 1-4. Respondent believes the Court of Appeals for the First District of Texas set out the facts material to this appeal; accordingly, respondent adopts pages 2a-9a of Petitioner's Appendix A as her counterstatement of the case. Pet., App. A 2a-9a.

Petitioner's Statement of Facts and Procedural History fail to acknowledge there is an active claim for toritious interference with an employment contract as well as a claim for defamation; therefore, Respondent objects to Petitioner's Statement of Facts and Procedural History. Pet. at 1-2.

REASONS FOR DENYING THE WRIT

1. Because the Court of Appeals for the First District of Texas remanded this case for further proceedings, its decision is not final.

Under 28 U.S.C. § 1257, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a); *O'Dell v.*

Espinoza, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed. 2d 237 (1982). A judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S. Ct. 770, 773, 89 L. Ed. 1171 (1945). It must be the final word of the court. *Id.* This finality rule is firm, not a technicality to be easily scorned. *Radio WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L. Ed. 2092 (1945). Because the Court of Appeals for the First District of Texas remanded this case for trial, its decision is not final as an effective determination of the litigation.

Although there is a limited set of situations in which this Court has found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 328 (1975), this case does not fit into any of those categories. This is not a case where the federal question finally decided by the highest court of the state will survive and require decisions regardless of the outcome of future state court proceedings. *Id.* Resolution of the state-law claims could effectively moot the federal-law question raised by petitioner. Most notably, if, at trial, Respondent cannot show that Petitioner acted with malice, then Respondent's defamation claim would necessarily fail.

This is not an instance where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Id.* If the Court of Appeals' decision ultimately makes a difference, the Petitioner will be able to seek review once the state court litigation comes to an end.

This appeal fits within no exceptional category; therefore, this court lacks jurisdiction to review the Court of Appeals' decision on Petitioner's claim of qualified immunity. Further, the Court of Appeals also remanded Respondent's cause of action for tortious interference with a contract; therefore, the Court of Appeals' decision on qualified immunity is not final to all issues. Accordingly, Petitioner's Petition should be denied for want of jurisdiction.

2. Petitioner is attempting to challenge a Texas procedural law; therefore, no federal question is presented.

The Texas Rules of Civil Procedure govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature. Tex. R. Civ. P. 2. The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature. Fed. R. Civ. P. 1. The case at bar is in the 190th Judicial District Court of Harris County, Texas. Therefore, the Texas rules of civil procedure govern this case.

Petitioner seems to be claiming this Court placed the burden on Respondent to show absence of malice in a summary judgment. Pet. at 6. In *Anderson v. Liberty Lobby Inc.*, this Court placed the burden on the party responding to summary judgment, in a defamation case in federal court, to show malice. 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). However, *Liberty Lobby* was based not on constitutional requirements, but merely on federal procedure. This Court was not granting "special procedural protections to defendants" because of the type of case involved, but merely applying general federal summary judgment rules to the particular circumstances of the particular circumstances of a public figure defamation case. 477 U.S. at 256 n.7, 106 S. Ct. at 2514 n.7, 91 L. Ed. 2d at 216 n.7 (1986). As Justice Brennan observed in his dissent:

> The Court's holding today is not, of course, confined in its application to First Amendment cases . . . It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.

477 U.S. at 257-58 n.1, 106 S. Ct. at 2515 n.1, 91 L. Ed. 2d at 217-18 n.1 (Brennan, J., dissenting).

Summary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. *See Casso v. Brand*, 776 S.W. 2d 551, 556 (Tex. 1989). In Texas, summary judgments are used to merely eliminate patently unmeritorious claims and untenable defenses. *City of Houston v. Clear Creek Basin Authority*, 589 S.W. 2d 671, 678 n.5 (Tex. 1979). Texas procedure never shifts the burden of proof to the non movant unless and until the movant has established his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. *Id.* at 678. Nothing in this Court's decision, in *Liberty Lobby*, compels a Texas court to abandon its established summary judgments procedure either generally or in a particular case. *Casso*, 776 S.W. 2d at 556.

The Court of Appeals for the First District of Texas acted properly in applying Texas summary judgment standards to a case pending in a Texas District Court. No federal question is presented by Petitioner's Petition, only one of Texas procedural law. Therefore, this Court should deny Petitioner's Petition for want of Jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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